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In the Supreme Court of the United States

OCTOBER TERM, 1946.

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No. 44.
No. 45.

IN THE MATTER OF
AMERICAN FUEL & POWER COMPANY, INLAND GAS CORPORATION, KENTUCKY FUEL GAS CORPORATION,
Debtors.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
LOUIS A. GREEN AND ROBERT HEILBRUNN,
Known in these Proceedings as the
GREEN COMMITTEE AND MORRIS GREEN,
Respondents.

VAN HORN BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,
against
CARL B. EARLY, DANIEL MATTHEWS, THOMAS MATTHEWS, JACK PATTON AND P. G. MEADOR,
Respondents.

BRIEF FOR PETITIONER.

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OPINIONS OF COURTS BELOW.

The District Court rendered no opinion but during argument stated the grounds for its decision (R. 56), and thereafter made an order and judgment embodying findings of fact and conclusions of law (R. 192).

The opinion of the Circuit Court of Appeals, Sixth Circuit, is reported 151 F. (2d) 470 (1945), and is also reprinted at R. 214 *et seq.*

JURISDICTION.

The judgments of the Circuit Court of Appeals which Petitioner seeks to have reviewed were filed on October 9, 1945 (R. 213, 214). A timely petition for re-hearing was made to the Circuit Court of Appeals (R. 234, 235) and was denied November 26, 1945 (R. 241). The petition for writs of certiorari made on behalf of Van Horn Bondholders Protective Committee was filed herein on February 15, 1946. The order of this Court granting the writs of certiorari was filed March 25, 1946 (R. 242).

Jurisdiction to review this case upon writs of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C., Sec. 347), and by Bankruptcy Act, Sec. 24(c), as amended (Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C., Sec. 47).

STATEMENT OF CASE.

The Circuit Court of Appeals, in a proceeding under Chapter X of the Bankruptcy Act, invalidated an express agreement that overdue bond coupons should bear simple interest from their respective due dates, which agreement had been sustained by the District Court.

The "Statement of Case" as presented in the brief filed by the Vanston Committee in the companion cases, Nos. 42 and 43, is adequate and need not be here repeated. We adopt it as our own statement.

QUESTIONS PRESENTED.

1. Whether in determining the rule for the choice of the governing local law concerning the validity of an interest provision in a multi-State contract made by a Debtor in Chapter X Proceedings the bankruptcy court should select the choice of law rule of the forum State.

2. Whether a corporate undertaking to pay simple interest on overdue bond coupons is invalid, although it does not violate the public policy of any of the States involved, nor of the United States, and would have been upheld if it had been litigated in the Courts of any of such States.

SUMMARY OF ARGUMENT.

1. Question No. 1 is argued by the Vanston Committee in the companion cases, Nos. 42 and 43, and that argument is adopted by petitioners herein.
2. The Indenture provision for the payment of interest on overdue coupons which was struck down by the Circuit Court of Appeals does not violate the public policy of the United States nor of any of the States involved.

ARGUMENT.

Petitioners herein are in agreement with the argument made on behalf of the Vanston Committee in the companion cases, Nos. 42 and 43. This brief is confined to a further discussion of the public policy of the State of New York with reference to the problem herein presented.

The covenant to pay interest on overdue interest coupons is not contrary to the public policy of New York.

The public policy of the State of New York with respect to agreements providing for the payment of interest on debt has been clearly indicated by the action of the New York Legislature, in the enactment of the usury laws. The laws of New York expressly declare that any agreement to pay interest at a rate in excess of 6% per annum is usurious and void. (N. Y. General Business Law Secs. 370, 371, 372, 373.) Although it has long been held that any such agreement, whether voluntarily made or somehow exacted, violates this Statute and will not be enforced, yet corporations

are *expressly excluded* from the protection of this law (N. Y. General Business Law Sec. 374) and the Courts of New York have enforced corporate agreements to pay interest in excess of 6%. (*Union Estates Company v. Adlon Construction Co.*, 221 N. Y. 183, where an interest rate of 23% was sustained.)

Where the Circuit Court fell into error was through interpreting New York decisions which protected an individual from oppressive interest as reflecting the public policy of New York on *all* interest questions, even those involving a *corporate* borrower. No citation of authority from the New York Court of Appeals—or from the New York Appellate Division—is given to support this view, and we do not believe that any can be found.

The case of *Young v. Hill*, 67 N. Y. 162, is cited as the leading case in New York on the question of validity of agreements to pay interest on interest. That case was one between individuals, and the reasons of public policy which justified the court in ruling that compound interest would not be enforced are clearly stated in the opinion, which also made clear that, notwithstanding the rule, there still may be enforcible obligations to pay interest on interest arising even from implied agreements, when such agreements are essentially fair.

The learned judges who participated in the case of *Young v. Hill* in 1876 would be surprised to learn that, seventy years later, the salutary rule of that case would be invoked to justify the repudiation by a *corporation* of an undertaking voluntarily made by it in favor of hundreds of innocent investors, and their surprise would be still greater if they could know that the undertaking in question was not an agreement to pay compound interest, which produced the fantastically oppressive charge which they refused to enforce, but merely "an agreement to pay simple interest upon the several installments of interest as they became due" which the court, even in the case of the indi-

vidual debtor in 1876, pointed out "might not be unreasonable or inequitable."

The rule of *Young v. Hill* was plainly intended to protect the "weak and ignorant" against extortion, not the corporation against its own voluntary promise. It is certainly not a precedent for the ruling of the Circuit Court in this case.

We have been unable to find any reported case in the New York Courts which decides the question here at issue. In the absence of precedents in the New York Courts, the Federal Courts are not without power to determine the public policy of that State. In undertaking such determination in the case at bar the Circuit Court considered, but refused to follow, the decision of Judge Patterson in *American Brake Shoe & Foundry Co. v. Interborough R. T. Co.*, 26 Fed. Supp. 954, and the dictum of Judge Clancy in *Transbel Investment Co. v. Roth*, 36 Fed. Supp. 396.

However, the question of the public policy involved in the allowance of simple interest on past due interest accrued on corporation bonds has again been presented to a Federal Court in New York since the Circuit Court's decision in the instant case. In a bankruptcy proceeding, *In Re Realty Associates Securities Corporation*, 66 Fed. Supp. 416, the United States District Court for the Eastern District of New York, on June 11, 1946, allowed to bondholders simple interest at 6% on accrued interest which remained unpaid at the maturity of the bonds, even though the debtor corporation had made no promise to pay it. At page 421, Judge Moskowitz said:

> "The distinction was inferred to in *American Brake Shoe & Foundry Co. v. Interborough R. T. Co.*, D. C. S. D. N. Y., 1939, 26 F. Supp. 954, where the court stated at page 955 of 26 F. Supp.: 'Compounding interest in the adding of accumulated interest to the principal at periodic intervals. An agreement to pay simple interest on an overdue installment of interest is different. Computations show it to be far less onerous

on the debtor.' The same distinction is recognized in the case which has been most often cited as authority against the validity of compound interest, *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99, where at page 174 of 67 N. Y., the court stated: 'An agreement to pay simple interest upon the several instalments of interest as they became due * * * might not be unreasonable or inequitable.' It is thus clear that the reason for the judicial outlawing of compound interest is based upon its being unduly oppressive and even ruinous to debtors, a criticism which does not lie against simple interest. The bondholders' claim in the instant case is only for simple interest upon a debt which has become due and is therefore not contrary to public policy."

Coming as it does shortly after the Sixth Circuit Court had declared that the public policy of the State of New York requires repudiation of a voluntary corporate undertaking to pay simple interest on overdue coupons, this decision by a New York judge is a significant reassertion of the true public policy in New York, completely in harmony with the declared policy of the Legislature to protect individuals against oppressive interest payments while requiring corporations to pay what they promise, even by implication.

CONCLUSION.

The judgments of the Circuit Court of Appeals, insofar as they reverse the judgment of the District Court, should be reversed with costs, and the judgment of the District Court should be affirmed with respect to the allowance of interest upon the interest coupons of the First Mortgage Bonds.

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